

Challenging Sexual Harassment on Campus

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Abstract

More than thirty years ago, an administrative assistant at Cornell University first challenged her university's indifference to her boss's sexually predatory behavior. While she did not prevail, her case sparked a movement. Litigation, news stories, and government guidelines defining sexual harassment followed. And universities responded: policies and grievance procedures are now in place, students and employees are informed of their rights, and university administrators and boards of trustees are aware that they must take the issue seriously. Yet campus sexual harassment continues. A 2006 study published by the American Association of University Women concluded that "sexual harassment remains a persistent problem for women on campus."¹ The question is why. After outlining the general development of sexual harassment law, this paper will present one possible explanation, arguing that the academic environment itself poses distinct challenges for those who confront sexual harassment in the ivory tower.

Introduction

Women seeking higher education or working in universities were long subjected to demeaning remarks, groping, kissing, leering, explicit proposals and even sexual assault by their supervisors, professors, and peers. This environment brutally reminded them that all of their intelligence, effort and creativity counted less than their sexual attributes.

Courts, employers and even many employees considered such practices to be obnoxious but inevitable when women entered the workplace; victims should ignore it and go on with their work. They learned that complaining about harassment did little or no good, and it actually could hurt. If they made accusations, they might in turn be accused of lying, exaggerating, or not being able to take a joke. They might be labeled a trouble-maker, prude, whore, or bitch. Most employers did not investigate allegations, much less sanction the harasser. Instead it often was the woman who was transferred to a lower position. Many women, therefore, kept silent; their jobs were too important to them. Some so dreaded going to work that they overused sick leave and were subsequently fired.

While this practice pervaded the work environment for women in general, it was a university woman who in 1974 was the first to charge her employer with permitting sexual harassment to occur. An administrative assistant at Cornell University, Carmita Wood was 44 years old and the mother of four when her boss, an eminent physicist, repeatedly tried to fondle and kiss her. She tried to avoid his predatory advances, but the stress made her ill. She asked to be transferred

¹ American Association of University Women, *Sexual Harassment on Campus*, available at <http://www.aauw.org/act/laf/library/harassment.cfm> (last visited July 9, 2010).

to another department. When that did not happen, Wood felt she had to quit. She filed for unemployment benefits on the grounds that she had quit under duress, but Cornell believed the physicist and claimed she had left voluntarily. She was denied benefits, and the physicist never was named.²

But her case sparked the movement that gave a name to what she and so many others had experienced: “sexual harassment.” Suddenly, many women were saying that they, too, had been harassed at work. By 1977, appeals courts in three cases³ had found that sexual harassment was sex discrimination and a violation of Title VII of the Civil Rights Act of 1964.⁴ Being subjected to harassment was “a sex-based term or condition of employment,” and therefore employers could be held liable for permitting it to continue. One of the courts ruled that—in the case of *quid pro quo* harassment where a supervisor demands sex in exchange for a job-related benefit—an employer is liable for the unlawful action of its supervisor⁵ even if the employer did not actually know, since the employer gave the supervisor the authority to hire and fire in the first place.⁶

Title VII remains the basis for employment discrimination lawsuits, so it covers staff, faculty, administrators, and students in their capacity as work-study employees, graduate assistants and post-docs. But it is not available for students as students. Those lawsuits must instead be brought under Title IX of the Educational Amendments of 1972, which reads:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.⁷

One of the first Title IX cases was brought against Yale University in 1977. Four undergraduate women and one male professor filed a complaint that Yale did not provide investigative processes or grievance procedures to address sexual harassment claims, thereby allowing such discrimination to continue. This denied female students an equal opportunity to pursue an education.⁸ While the claims of three of the students and the professor were dismissed, the fourth student was allowed to proceed with her lawsuit. Unlike the others, she had directly experienced harassment, tried unsuccessfully to complain to university authorities, and had not

² Carrie N. Baker, *The Women’s Movement Against Sexual Harassment* § Ch. 2 (2008).

³ *Tomkins v. Public Service Electric & Gas Co.*, *Barnes v. Costle*, and *Miller v. Bank of America*.

⁴ Civil Rights Act of 1964, Title VII, 42 U.S.C. § 21 (1964).

⁵ Plaintiffs generally bring sexual harassment suits not against their actual harassers, but against those who employ the harassers, such as companies or school administrators.

⁶ This strict liability is common in tort liability and is called the doctrine of *respondeat superior*.

⁷ Education Amendments of 1972, Title IX, 20 U.S.C. § 1681(a) (1972).

⁸ *Alexander v. Yale University*, 631 F. 2d 178 (2nd Cir. 1980).

yet graduated. Her case led to universities developing policies and procedures to respond to claims of sexual harassment.⁹

Despite important advances in the 35 years since Carmita Wood first challenged it, sexual harassment remains a fact of life on campus as elsewhere. In their 2006 study *Drawing the Line*, the American Association of University Women reports that “62% of female college students and 61% of male college students report having been sexually harassed at their university.”¹⁰ The actual incidence might be higher; the study found that “10% or less of student sexual harassment victims attempt to report their experiences to a university employee,” and 35% or more “do not tell anyone about their experiences.”¹¹ The AAUW concludes that “sexual harassment remains a persistent problem for women on campus.”¹²

The scope and persistence of sexual harassment on college campuses seems surprising. After all, policies and procedures have been instituted, students and employees informed of their rights, and university administrators and boards of trustees put on notice to take the issue seriously. Why, then, does sexual harassment continue? After outlining the general development of the law, this paper will argue that the academic environment itself poses distinct challenges for those who confront sexual harassment in the ivory tower.

Development of Sexual Harassment Law

Initially, legal redress for victims of harassment was difficult to attain. The courts had to decide if sexual harassment amounted to sex discrimination. In 1986, the U.S. Supreme Court agreed with lower courts that it did, in their first decision on sexual harassment, *Meritor Savings Bank v. Vinson*.¹³ Gradually federal and state courts expanded the scope of the law as they answered the following legal questions.

First, is the harassment still actionable if there is no threat to job security or promotion, no tangible economic loss? Related to that, is it illegal harassment if it is not the supervisor but a co-worker who is making rude comments and obscene gestures? At first the courts said no, that sexual harassment without the *quid pro quo* element was not sex discrimination. However, by the late 1970s, state courts were using their tort and human rights laws to recognize a hostile work environment as discrimination.¹⁴ By the mid 1980s, federal courts did so as well, finding

⁹ *Alexander v. Yale*, 459 F. Supp. 1 (1977). Ruling on the Motion to Dismiss.

¹⁰ American Association of University Women, *Sexual Harassment Statistics*, available at http://www.aauw.org/act/laf/library/harassment_stats.cfm (last visited July 9, 2010).

¹¹ *Id.*

¹² American Association of University Women, *Sexual Harassment on Campus*, available at <http://www.aauw.org/act/laf/library/harassment.cfm> (last visited July 9, 2010).

¹³ *Meritor Savings Bank v. Vinson*. 477 U.S. 57 (1986); Augustus B. Cochran III, *Sexual Harassment and the Law: The Mechelle Vinson Case* (2004).

¹⁴ Baker. 2008, 78-79. See, for example, *Kyriazi v. Western Electric Co.* in 1978 and *Continental Can Co. v. Minnesota* in 1980.

that a hostile work environment altered the conditions of employment. In 1980, the U.S. Equal Employment Opportunity Commission issued guidelines that also recognized hostile work environment. Sexual harassment is “unwelcome sexual conduct that is a term or condition of employment;” that is, when “submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment.”¹⁵ Note that not all “conduct of a sexual nature” is barred from the workplace, under the EEOC guidelines. The EEOC guidelines define hostile work environment as one where harassment is “sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment.’”¹⁶ Citing an appeals court decision, the EEOC added, “Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.”¹⁷ Employers have a lower level of liability than in *quid pro quo* harassment, however. They are liable only if they know or should have known and failed to take prompt remedial action.

This development has been important to the campus environment because this form of harassment is much more common than *quid pro quo*. According to a report by the AAUW, 80% of the sexual harassment reported by college women and men was hostile work environment, harassment by other students and former students, not faculty and staff.¹⁸

Second, if there is no economic loss, does the plaintiff have to show severe psychological or emotional distress in order to bring a lawsuit? This question arose in the case of Teresa Harris, a manager at a forklift rental company who was subjected to repeated sexual comments and jokes by her boss for two years. However, when she finally quit and sued for back wages, she showed no signs of being psychologically injured. If she was not harmed—financially or emotionally—was she a victim of unlawful harassment? In 1993, Supreme Court Justice Sandra Day O’Connor ruled for Harris, arguing that the impact on the victim is irrelevant. It is sexual harassment if it creates what a reasonable person would consider a hostile or abusive environment (this paper will return to the “reasonable person” standard later.). Factors for courts to consider are “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”¹⁹ This case is important for victims of harassment because they do not have to suffer a nervous breakdown before they can file a claim. Determining that sexual harassment occurred is not as subjective as it had been, based heavily on

¹⁵ U.S. Equal Employment Opportunity Commission, *Policy Guidance on Current Issues of Sexual Harassment*, 1990, available at <http://www.eeoc.gov/policy/docs/currentissues.html> (last visited August 22, 2010).

¹⁶ *Id.*

¹⁷ *Id.*, citing *Henson v. City of Dundee*, 682 F.2d 897, 902 - 904 (11th Cir. 1982).

¹⁸ AAUW, *Sexual Harassment Statistics*.

¹⁹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

the reactions of each individual victim. On the negative side, those who are sensitive about sexual comments in the workplace now face a greater challenge in bringing legal action.

Third, is it a hostile work environment if the sexual behavior is not lewd or lascivious? This question has not come before the Supreme Court, but in a 1991 case, an appeals court found that it could be. The harasser in this case was a love-sick co-worker who persisted for months in pursuing his female colleague, leaving her love notes, hanging around her desk, repeatedly asking her out. She let him know that his advances were unwelcome. He persisted. She complained to her supervisors; they did not reprimand him but did transfer him to another unit. He soon got himself transferred back to her office. He was virtually stalking her, in a way that was not obscene but was so disturbing that it frightened her. Historically, courts applied the “reasonable man standard” in assessing the reasonableness of a victim’s reaction; they have since moved to the “reasonable person” standard, as noted above. Here, however, the judges used the victim’s perspective, a “reasonable woman” standard, in order to find that—from her perspective—her co-worker’s attentions were neither trivial nor flattering.²⁰ This is one of the few times that a court used this standard.

Fourth, if the victim and perpetrators are of the same sex, can it still be sex discrimination? Further, is it sexual harassment if sexual desire is not a motivating factor? The Supreme Court said yes to both questions in 1998, reversing both the district court and court of appeals. The case involved the sexual harassment of Joseph Oncale, an effeminate heterosexual man, by a group of other heterosexual men working on an off-shore oil rig. He had been threatened with rape and sodomized with a bar of soap. Eventually, he quit, citing sexual harassment and verbal abuse as the reasons. He sued. But was this sexual harassment? Justice Antonin Scalia, writing for the court, said that “Title VII’s prohibition of discrimination ‘because of … sex’ protects men as well as women.”²¹

This case and others seem to have raised men’s awareness of sexual harassment law. They are filing more complaints than in the past, according to the EEOC, even as the total number of sexual harassment claims has been falling. In 1997, 11.6% of complaints were brought to the EEOC by men; by 2009, it was 16%.²² As in the *Oncale* case, most of the cases involve same-sex heterosexual “locker room horsing around.” The rate of incidence of male-on-male harassment may actually be understated, since many men are still loath to report this as unlawful harassment. These figures may show a broader societal understanding that sexually aggressive conduct in the workplace is inappropriate for everyone, and incidents have to be taken seriously by an employer.

²⁰ *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

²¹ *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

²² U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges: FY 1997- FY 2009*, available at: http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited July 7, 2010).

The Educational Environment

The courts and the U.S. Department of Education have drawn heavily from Title VII case law when determining what sexual harassment and hostile environment mean in an academic context. “Sexual harassment is unwelcome conduct of a sexual nature,”²³ according to the Office of Civil Rights, and sexual harassment of students is sex discrimination under Title IX of the Educational Amendments. One early scholar in the field explained why:

A sexually abusive environment prevents a student from obtaining the most from an academic program and inhibits him or her from developing his or her intellectual potential. Loss of an academic benefit on the basis of sex violates Title IX.²⁴

This was recognized by the Supreme Court in 1992 in *Franklin v. Gwinnett County Public Schools*, only the second sexual harassment case reviewed by the high court.

The limits of Title IX

One factor arguably contributing to the persistence of sexual harassment in academic institutions are the limits of Title IX compared with Title VII, which make it more difficult for students to challenge sexual harassment in court than for workers. For example, unlike Title VII which applies to virtually all employers, Title IX applies only to recipients of federal funding. Schools not receiving federal funds are not covered. In other important ways, those seeking redress under Title IX have encountered obstacles, particularly in terms of money damages for plaintiffs and standards of liability for schools.

Under Title IX, allegations of discrimination against a school are investigated by the Office of Civil Rights in the U.S. Department of Education, which has the authority to punish an educational institution by taking away its federal funding. That remains a key component of Title IX; as described by the Office of Civil Rights, a public school is obligated “to take reasonable steps under Title IX and its regulations to prevent and eliminate sexual harassment as a condition of its receipt of federal funding.”²⁵

Initially, this meant that the statute was not interpreted to permit private lawsuits. In 1979, seven years after its passage, the Supreme Court ruled that individuals could bring private lawsuits under it.²⁶ But in that case, the Supreme Court also determined that Title IX did not authorize

²³ U.S. Office of Civil Rights. 2001. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. Title IX. U.S. Department of Education. Jan. 19, available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (last visited July 5, 2010).

²⁴ Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 Texas L. Rev. 525, 551 (1987)

²⁵ Office of Civil Rights. 2001.

²⁶ *Cannon v. University of Chicago*, 441 U.S. 677 (1979). This was not a case involving sexual harassment but discrimination in admissions.

money damages for winning plaintiffs, unlike the Civil Rights Act of 1964.²⁷ The only available remedies were back pay and an injunction to stop future discrimination. This ruling had two negative consequences. First it discouraged attorneys from taking discrimination lawsuits filed against educational institutions, even if there were strong grounds for winning, because attorneys get paid from the monetary awards their clients receive. Second, it gave students who were subjected to sexual harassment no meaningful remedy. There can be no back pay. And an injunction only applies if the teacher is still at the school and the student has not yet graduated.

A watershed decision for Title IX sexual harassment law came with *Franklin v. Gwinnett County Public Schools* in 1992. The Supreme Court reversed its 1979 precedent and found that students could sue for monetary damages. The case involved a high school student, Christine Franklin, who had been coerced into a long sexual relationship with her coach and teacher. The school administrators and teachers knew of the harassment of Franklin and other girls, and they finally started an investigation. But when the teacher resigned on the condition that the matter be closed, they dropped it. That was when Franklin filed a lawsuit and sought money damages. The lower courts rejected her claim because of the 1979 precedent. But the Supreme Court, in a unanimous decision, found that regular Title IX remedies—back pay and injunctions—are inadequate when redressing the harassment of students. Monetary damages were the only relief possible.²⁸ In 1999, the Court applied this reasoning to a case involving student on student harassment in *Davis v. Monroe County Board of Education*. The justices found that a private Title IX damages action was possible against the school board in cases “where the funding recipient is deliberately indifferent to sexual harassment, of which the recipient has actual knowledge, and that harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”²⁹ The lower court had dismissed the *Davis* lawsuit, but the justices reinstated it, writing that the facts of the case suggested that the plaintiffs might succeed in making their case.

While money damages are now possible, educational institutions remain more immune from sexual harassment lawsuits brought by students than employers are from lawsuits brought by employees. Courts do not apply the strict liability standard even though teachers are in a position of authority over students. In fact, in some instances, they exercise greater authority than an employer.

This became starkly apparent in a 1998 Supreme Court ruling involving a student named Alida Star Gebser. Her high school honors teacher had initiated a sexual relationship with her when she was 14. The sexual relationship continued almost two years, usually during class time but off campus. She did not tell anyone out of fear of losing a popular honors teacher. From other

²⁷ Plaintiffs may receive back pay, reinstatement of employment and attorney’s fees under Title VII. The Civil Rights Act of 1991 expanded possible remedies to include compensatory and punitive damages.

²⁸ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

²⁹ *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

students, however, the principal learned that the teacher made sexual comments in class, and the teacher was advised to stop. There was no further investigation. A few months later, the teacher was caught having sex with Gebser; he was fired and charged with statutory rape. Gebser and her parents sued the school district because it had no anti-harassment policy or grievance procedure. The school district argued that it did not know of the harassment and should not be held liable, and that the teacher had acted as an individual and not their agent when he preyed on Gebser. Furthermore, any monetary damages to Gebser would come from the school's limited budget, hurting other students.³⁰

The lower courts and the Supreme Court agreed with the school district: to be liable under Title IX, school personnel with the authority to stop it must know of the harassment and act with deliberate indifference when they fail to do so. The term “deliberate indifference” has not been defined by the courts or the Office of Civil Rights, making it difficult for a plaintiff to predict the outcome of her or his case. Furthermore, this is a higher standard to meet than employees are required to make under Title VII. To succeed in a Title IX lawsuit, the plaintiff must show actual notice to someone who has the authority to end the discrimination, and their subsequent deliberate indifference. Indeed, the requirement that university officials be given adequate notice has been held to apply even in *quid pro quo* cases, where students have been threatened with failing grades if they refuse sexual advances.³¹ This is a break from Title VII case law.

When a victim of harassment complains is also important. Under both Title VII and Title IX, courts insist that a “reasonable person” would report these incidents immediately and thereby provide the employer or school with an opportunity to remedy the situation and avoid liability. But this standard disadvantages female plaintiffs in sexual harassment lawsuits. While preferable to the traditional “reasonable man” standard, it ignores how many women react. Legal scholar Camille Hebert argues that women tend to utilize informal means to resolve sexual harassment, even hoping that the harasser will stop on his own, rather than immediately filing a formal complaint. This hurts them in court, however, since judges tend to question the veracity of someone who does not file promptly through official channels.³² Hebert describes one case where the harassment started on March 13, then stopped, then resumed on June 12, June 13, June 17 and June 18. The employee reported it to the employer on June 20, as soon as she saw that March 13 was not an isolated incident. But the judge found that her behavior was unreasonable since she had waited three months to report the first incident.³³ Hebert writes that the reasonable woman standard would better capture the responses of women to sexual harassment.³⁴

³⁰ *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

³¹ See, for example, *Johnson v. Galen Health Institutes Inc.* 267 F. Supp. 2d 679 (2003).

³² Camille Hebert, *Why Don't 'Reasonable Women' Complain About Sexual Harassment?* 82 Indiana L. J. 711 (2007).

³³ *Phillips v. Taco Bell, Corp.*, 156 F. 3d 884 (8th Cir. 1998).

³⁴ Hebert, 2007.

The standard may be even more problematic in the case of female students. To establish that sexual harassment has occurred, the student must first communicate to the harasser that the sexual comments and actions are unwelcome. Unless that is done, it is not harassment as far as the courts are concerned. If it continues, the student then must notify someone at her or his institution who has the authority to stop it; a counselor may not qualify. All victims of harassment—whether student or employee, male or female—must follow this general process. But female students are at greater risk of not following through. The AAUW study documented significant differences between male and female students in how they responded to sexual harassment. Female students reported more negative reactions, among them “trouble sleeping, loss of appetite, decreased participation in class, avoiding a study group, thinking about changing schools, changing schools, changing majors.”³⁵ Trouble sleeping or eating, and avoiding class or study groups, directly affect a student’s academic performance. If she then fails, she may appear to be making excuses when she later claims sexual harassment; her credibility is damaged. A student’s veracity is further damaged in cases where she changes schools or her major in order to avoid the harasser, and only reports the harassment years later. In sum, by ignoring gender differences in how people react to harassment, the courts permit an environment where sexually abusive behavior can continue.

Entrenched male dominance

Sexual harassment remains pervasive at universities, despite their anti-harassment policies, particularly in fields of study where women remain the minority and are largely clustered in subordinate positions. Harassment may be especially difficult to eradicate in the physical sciences, where a culture of confidentiality tends to support secrecy, and where women remain scarce in top spots despite the fact they earn an increasing numbers of Ph.Ds. Ellen Sekreta, a J.D. and Ph.D. in chemistry, argues that power in a science lab is hierarchical and very centralized. Graduate students are expected to get along with their advisers and keep silent about any problems.³⁶ When a female graduate student accuses a professor of sexual harassment, she breaks this powerful norm. As a result, she often is successfully marginalized as a trouble maker, with the court focused on her behavior rather than that of the alleged harasser.³⁷ Further, the National Science Foundation is unclear about liability; its rules are not clear that sexual harassment counts as scientific misconduct which could result in the loss of federal funding. Sekreta observes that “students are under great pressure to not report professors who sexually harass them.”³⁸

³⁵ AAUW. “Sexual Harassment Statistics.”

³⁶ Ellen Sekreta, *Sexual Harassment, Misconduct, and the Atmosphere of the Laboratory: The Legal and Professional Challenges Faced by Women Physical Science Researchers at Educational Institutions*, 13 Duke J. Gender L. & Policy 115 (2006).

³⁷ Sekreta points to *Sodergren v. Johns Hopkins University Applied Physics Lab.* 773 A. 2d 592 (2001). Also see *Reifsneider v. Regents of the University of California*. 2001 WL 1215850 (Cal. Ct. App. Oct. 12, 2001).

³⁸ Sekreta. 2006.

Another area of male dominance on campus is athletics. Many hostile environment claims involve student athletes accused of sexual assault. “Statistics show that male athletes are more likely than the average male college student to commit sexual assaults,” according to legal scholar Jenni Spies. Among the studies she cites is one from the FBI, which states that “the rate of committing sexual assaults is thirty-eight percent higher among college basketball and football players than the average male college student.”³⁹

Despite these figures, universities often are not held accountable for the actions of their student athletes. One clear example of this was a case brought against the University of Colorado in 2002. The case was filed by two female students—Lisa Simpson and Anne Gilmore - who been raped by several Colorado football players and recruits while at a party off campus in late 2001.⁴⁰ Both Simpson and Gilmore claimed that they were denied the ability to enjoy the benefits of the university's educational program because of the sexual harassment: Simpson had withdrawn from the university and Gilmore, who remained, suffered emotional distress at having to attend school with the men who had assaulted her. They argued that the university did know of the sexual harassment by football players, particularly during the recruitment season, by pointing to seven separate incidents from 1997 to 2001 of sexual assault and harassment involving Colorado football players, recruits and coaches. Not only did the university know, but it had failed to respond with “immediate, appropriate and effective steps” to ensure that the hostile environment did not continue.⁴¹

Without disputing the facts of the alleged assault, the U.S. District Court dismissed their case, finding that the university did not have notice of “the particular risk as required by Title IX.” Even knowledge of the risk was not sufficient for finding against the university, the court said. The students had to demonstrate that Colorado had “acted with deliberate indifference,” and not simply “failed to respond,” as the students had charged. The judge determined that “the university's actions taken in response to the [seven previous incidents] were not clearly unreasonable.” Finally, the district judge ruled that the women did not have standing to seek injunctive relief under Title IX because they could not show that they would be likely to suffer “future injury from the type of sex discrimination alleged in their complaint.”⁴²

Then, in 2004, news broke that the University of Colorado football program had used alcohol, drugs and sex for years to recruit high school players. Other campus women came forward with similar reports of sexual assault.⁴³ A series of investigations ensued, followed by the

³⁹ Jenni E. Spies, *Winning at all costs: An analysis of a university's potential liability for sexual assaults committed by student athletes*, 16 Marquette Sports L.Rev. 429, 429-430 (2006).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Simpson v. University of Colorado*, 372 F. Supp. 1229 (2005).

⁴³ Jeff Brady, *Scandal Returns to University of Colorado Football*, National Public Radio, June 14, 2009, available at: <http://www.npr.org/templates/story/story.php?storyId=105381707> (last visited June 30, 2010).

resignations of a number of top university administrators, including the president, chancellor, head coach and athletic director. In 2007, the university agreed to settle the sexual harassment lawsuit for \$2.85 million.⁴⁴

More than five years later, the Colorado case resulted in a court victory for Simpson and Gilmore. Yet they succeeded only because their experience was part of a larger scandal that captured headlines for years. Without media attention on a lurid scandal, the campus climate that permitted the initial assault would likely have continued, as it had for the preceding four years. Spies writes, “In the context of recruited male athletes sexually assaulting female students, no court has yet held exactly how much a school official must know before it is willing to find that the school has actual knowledge of the risk of sexual harassment.”⁴⁵ Student athletes on some campuses continue to operate in a privileged position, with administrators hesitant to pursue allegations of misconduct.⁴⁶

Complicated power relations in academia

Unequal power relations mark universities as well as non-academic workplaces. However, unlike in the workplace with its clearly delineated hierarchies, power relationships in universities can be complicated.

As in the workplace, universities have adopted anti-harassment policies and grievance procedures to demonstrate that they do not condone student sexual harassment. Occasionally, administrators have taken their policies a step further, instituting policies that appear to reflect old attitudes of *in loco parentis*. Since the mid-1980s, for example, many campuses have enacted policies banning consensual relationships between faculty and students. A key element of sexual harassment is that it is unwelcome; yet schools ignore the fact that such relationships may be welcome and therefore not amount to sexual harassment. Professor/student relations are considered intrinsically problematic because they are based on unequal power relations. Is the student really free to decline the invitation to have an affair, without risking grade retaliation? Even “voluntary” relations may be unwelcome, as the Supreme Court noted in its first sexual harassment case, *Meritor Savings v. Vinson*. Yet policies banning consensual relations raise the issue of respecting women’s choices. Are these policies paternalistic, not trusting women students to make their own life decisions? Some critics say yes, arguing that a woman’s consent to sex should be taken as seriously as her refusal.⁴⁷

⁴⁴ Allison Sherry, *CU Settles Case Stemming From Recruit Scandal*. Denver Post. Dec. 6, 2007, available at: http://www.denverpost.com/ci_7645722?source=pkg (last visited June 30, 2010).

⁴⁵ Spies. 2006, 457.

⁴⁶ Also see Diane Heckman, *Title IX and Sexual Harassment Claims Involving Educational Athletic Department Employees and Student-Athletes in the Twenty-First Century.*” 8 Va. Sports & Entertain. L. J. 223 (2009); and Holly Hogan, *What athletic departments must know about Title IX and sexual harassment*, 16 Marquette Sports L. Rev. 317 (2006).

⁴⁷ Sherry Young , *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 Am. U. J. Gender & Law 269 (1996).

Another problem with focusing on power relations in a university setting is that it ignores the possibility of teachers being sexually harassed by their students. Newer female faculty appear to be the most vulnerable. This sort of harassment is usually not mentioned in college policies, and administrators may see it as a failure of classroom discipline and therefore the teacher's fault. In the few lawsuits brought by teachers against their schools for failing to intervene, the lawsuits have often been dismissed early in the process. That may be changing with some federal courts. For example, in a case brought in 2005, the U.S. District Court of Puerto Rico ruled that a teacher harassed by a student could bring a cause of action under either Title VII or Title IX.⁴⁸ The ruling is not binding on other jurisdictions but could influence other courts as they face similar issues. It also could alert schools to take these concerns seriously and to revise their policies to include student on teacher harassment that creates a hostile environment.⁴⁹

Sexual harassment and academic freedom

The final issue to be addressed is one that involves two important values that may come into conflict: on one hand, a student's right to be free of sexual harassment and, on the other, a professor's academic freedom and freedom of speech.

Human sexuality is central in many academic disciplines, including sociology, health studies, cultural anthropology, gender studies, and social work. It is relevant in political science, criminal justice, film studies and English as well. Sexual identity, sexual expression, rape and sexual abuse, pornography, incest and sexual politics are major contemporary themes that are studied in college classrooms around the country.

But the topic is a charged one. Is sexually explicit talk in a classroom covered by academic freedom? Does the first amendment of the U.S. Constitution protect language that arguably fosters a hostile environment?

The question arose in a 1994 case against the University of New Hampshire. An English professor was accused of creating a hostile environment when he used a belly dancer's description of belly dancing to illustrate the elements of a good definition. Her description was that dancing was like Jello on a plate with a vibrator under it. On another day, the professor told students that they needed to learn to focus, which he described as similar to sex: "You seek a target. You zero in on your subject... You bracket the subject and center on it."⁵⁰ He used the analogy with sex, he said, so students would better understand it. When some students complained, the administration investigated and suspended him without pay for one year. Citing academic freedom to teach his material, he went to district court for an injunction to halt the

⁴⁸ *Plaza-Torres v. Rey*, 376 F. Supp. 2d 171 (DPR 2005).

⁴⁹ Heather Shana Bancheck, *Overcoming a Hostile Work Environment: Recognizing School District Liability for Student-on-Teacher Sexual Harassment*, 55 Cleveland State L. Rev. 1 (2007).

⁵⁰ *Silva v. New Hampshire*, 888 F. Supp. 293 (1994).

suspension. The judge agreed. The court found that his comments “were not of a sexual nature but were legitimately related to the pedagogical concern of explaining the topic at hand in a way that he believed the students could comprehend.”⁵¹ This may be a questionable teaching tool but the references to sex in themselves did not constitute harassment.

Academic freedom is not well defined in the law, but it is not a blank check. As the judge noted in this case: “Free speech does not grant teachers a license to say or write in class whatever they may feel like.” It depends on “the age and sophistication of the students, the closeness of the relation between the specific technique used and the concededly valid educational objective, and the context and manner of presentation.”⁵² This is generally consistent with view expressed by the American Association of University Professors. Two principles are paramount: “Speech by professors in the classroom at public institutions is generally protected under the First Amendment and under the professional concept of academic freedom if the speech is relevant to the subject matter of the course;” further, “Faculty members are ...uniquely positioned to determine appropriate teaching methods.”⁵³ However, academic freedom and the first amendment do not protect a professor when the speech is not relevant to the subject matter of the course, and “teaching methods cross the line from pedagogical choice to sexual harassment.”⁵⁴ A case-by-case study may be needed to weigh the important interests of the students and legitimate interests of the university, balanced against the professor’s right to speak.

University administrators, fearful of the threat of litigation or adverse publicity, sometimes overreact whenever sex is mentioned in a classroom. That occurred in a case involving another English professor, who was using the concept of “clustering” in his class on composition. He had used the exercise before. It involved getting a word from a student, and then having other students identify similar terms which he would then cluster into groups on the blackboard. This time, a student volunteered the word “sex.” The professor added “and relationships.” Many of the words contributed by other students, however, were vulgar and crude. He wrote them on the blackboard but cautioned students against using such inappropriate language in their writing. After the class, neither students nor parents complained. However, university administrators learned of the clustering exercise while talking with a student during an unrelated investigation. They questioned the professor and reviewed his class notebooks. He was then fired due to his “reliance on sex as a theme and of sexually-explicit vocabulary.”⁵⁵ He filed suit in district court against the university administrators on the grounds that they had violated his first amendment speech rights. The university lost its motion for a summary judgment, but the appeals court

⁵¹ *Id.*

⁵² *Id.*

⁵³ Rachel Levinson, *Academic Freedom and the First Amendment*. American Association of University Professors Summer Institute, July 2007, available at <http://www.aaup.org/AAUP/protect/legal/topics/firstamendment.htm> (last visited August 1, 2010).

⁵⁴ *Id.*

⁵⁵ *Vega v. Miller*, 273 F. 3d 460 (2nd Cir. 2001).

reversed. The appellate judges found that university administrators have a qualified immunity protecting them from lawsuits arising from their official actions that seem reasonable at the time. Although the professor was not successful in getting restitution from the administrators, the appellate judges did find in his favor that he had engaged in the clustering exercise “for legitimate pedagogical purposes.”⁵⁶

These cases generally are reassuring to faculty who teach sex-related subjects, or find that references to sex are an effective teaching tool. But some cases present less clear examples of the value of speech that creates a humiliating atmosphere for students.

Consider the 1996 case, *Cohen v. San Bernardino Valley College*. Cohen, a tenured English and film professor, often used profanity, derogatory language and sexual innuendo in his remedial English courses. He frequently took the “devil’s advocate” role to argue in favor of such things as cannibalism, consensual sex with children, and obscenity. He assigned provocative topics, for example, asking his students to define pornography. In 1992, one student objected to his focus on sexual topics and asked for a different essay assignment than pornography. Cohen refused. The student, feeling that he was treating her and other women in the class in a humiliating and harassing manner, stopped attending the class and ended up failing. She then filed a complaint that his conduct amounted to sexual harassment. The college had recently instituted a new policy against sexual harassment. Using it, the faculty grievance committee investigated and found that Cohen had violated the provision that bars conduct which has the “effect of unreasonably interfering with an individual’s academic performance or creating an intimidating, hostile, or offensive learning environment.” They ordered him to take a sexual harassment seminar, submit his course syllabi for advance review, undergo a formal evaluation, and “become sensitive to the particular needs and backgrounds of his students and to modify his teaching strategy when it becomes apparent that his techniques create a climate that impedes students’ ability to learn.”⁵⁷ The board’s decision was made part of his personnel file with the note that further violations could result in his termination.

Cohen sued the college, the grievance board, administrators and others for violating his first amendment rights. He lost at the district court level, but the appeals court reversed in part. The judges ruled that new policy was too vague to have provided Cohen sufficient notice that his speech was crossing the line. Laws and policies that impact fundamental freedoms—such as speech—must be narrowly tailored. The court did not say that the college could not punish this type of speech in the future, if it used a more precise and less vague policy. However, the college could not apply it retroactively. Cohen won, but he did not prevail on his claim that college administrators were personally liable for violating his rights. As in the preceding case,

⁵⁶ *Id.*

⁵⁷ *Cohen v. San Bernardino Valley College*. 92 F. 3d Supp. 968 (9th Cir. 1996).

the appeals court ruled that school administrators have a qualified immunity for their official actions that appeared reasonable at the time.⁵⁸

Concluding Thoughts

Sexual harassment law has achieved much in the past three decades. The term did not even exist in 1974, much less the concept of a hostile work environment. In subsequent years, courts have found that those claiming sexual harassment need not show a tangible economic loss, or severe psychological or emotional distress; and harassment need not be lewd or obscene, or even based on sexual desire. Legal and policy changes have made major inroads in fostering an environment where all people can study, teach, learn and work without fear of harassment or intimidation; an environment free of discrimination.

Yet sexual harassment has remained remarkably difficult to eradicate. Obstacles to enforcement remain. Victims of harassment must be proactive in communicating to the harasser that the conduct is unwelcome, and must notify their employers or institutions immediately. They should maintain records that document the harassment and their efforts to end it, and monitor the actions taken by their employers in response. With very few exceptions, courts have not considered the perspective of the woman victim in deciding if her actions are reasonable.

Another obstacle to a harassment-free environment is that the person who harasses—whether boss, professor, coworker or fellow student—is not personally liable in a civil lawsuit.⁵⁹ There often is no incentive for an individual not to harass.

These obstacles are compounded on college campuses where the incidence of sexual harassment remains high, with almost two-thirds of all students—male and female—reporting in 2006 that they had been subjected to it during their academic careers. Creating a university environment free of harassing, intimidating and demeaning conduct is particularly challenging. As outlined in this paper, Title IX of the Educational Amendments of 1972 has been a less effective mechanism for challenging sexual harassment than Title VII. In addition, male dominance remains a reality in certain sectors of campus, including the physical sciences and athletics. With few women, and fewer still in top positions, those environments may be more likely to turn a blind eye to the sexually harassing behavior of their colleagues. Another obstacle to change is that, in a university setting where power relations are complex, sexual harassment policies may be blunt instruments that ignore one set of potential victims—women teachers—while interfering with the sexual choices of women students. Finally, a clash of values is particularly problematic when sexual content in a class creates tension between students who may feel humiliated and marginalized and a professor whose speech may be protected under the first amendment.

⁵⁸ *Id.*

⁵⁹ If physical force is used, a prosecutor may agree to bring sexual assault charges, but they are even more difficult to win than a sexual harassment claim, because they require evidence beyond a reasonable doubt, with the burden of proof on the government.

In conclusion, legal and policy changes only go so far as a safeguard of civil rights. In the end, broader societal attitudes must change. Sexual harassment must stop. Litigation is one important avenue of change, but so is education. It is time to start talking again about what sexual harassment does and does not mean. This is even more critical in a university setting.

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